> special access offerings that cannot be justified by FDC studies are unjust or unreasonable because of injury to competition.

Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, 945-46 (1984) (citations omitted).

In addition, volume discounts in the price of cable programming bring an added "economic benefit" to the programmer: a larger volume of subscribers translates into increased advertising revenues to the programmer. For advertiser-supported program services this is a critical benefit. Advertising is the lifeblood of such services. Their success at generating advertising revenue is directly related to their ability to provide maximum consumer reach to the advertiser. Distributors who deliver large volume to a programmer thus confer on the programmer a uniquely substantial benefit. It is reasonable that the pricing to that distributor reflect that benefit.

The increased advertising revenues made possible by volume, in turn, serve further to recoup programming costs and thus increase the output of programming. Increasing the diversity of programming is an explicit objective of Section 628[38] and, of course, a longstanding goal of the Commission.[39] The attached Besen Paper (page 11) supports the conclusion that volume discounts will promote this goal:

> the existence of significant volume discounts will promote efficiency in the supply of programming. As a result, preventing such a

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[38] 47 U.S.C. Sec. 548(a).

[39] See 1990 Cable Report at 5060-5061.

> pattern of pricing across MSOs and video distributors of varying size runs a high risk of reducing efficiency and restricting the supply of programming.

In addition, volume discounts can result in more services for subscribers, increased channel capacity, and lower consumer rates. The Besen Paper (page 9) concludes that "[b]oth the short run and long run effects of lower wholesale service prices serve to improve economic efficiency and increase consumer welfare."

The language of Section 628 and its legislative history support the proposition that volume discounts are permissible. As noted, Section 628 (c)(2)(B)(iii) allows a vertically integrated programmer to establish difference prices, terms and conditions which produce benefits "reasonably attributable to the number of subscribers served by the distributor.[40] In discussing subsection (c)(2)(B)(iii), the Conference Report uses identical language. Thus, it is clear that Congress intended to permit different prices based on the number of subscribers, i.e., volume discounts.[41]

In recommending the desirability of volume discounts, TCI does not mean to imply that different volume discounts for different methods of video programming distribution should be permissible. Rather, volume discounts proportionally available to all distributors, regardless of the technology employed, should be permissible. Only if different volume discounts for

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[40] 47 U.S.C. Sec. 548 (c)(2)(B)(iii).

[41] Conference Report at 93.

different technologies are justified by cost or other factors should this type of differential pricing be permitted.

TCI believes this issue is at the heart of Congressional concern as reflected in Section 628. The Commission should, therefore, prohibit price differences between distribution technologies based solely on the technology and unrelated to cost and other legitimate factors, e.g. signal security, financial stability. See Besen Paper at pages 20-23.

For these reasons, the Commission should read Section 628(c)(2)(B)(iii) to permit volume discounts consistent with the comments above. As the Besen Paper (at page 11) concludes, "[a] blanket prohibition on the use of volume discounts would in most cases risk a loss of efficiency where there was virtually no risk of anticompetitive effect."

### 6. <u>Exclusive Contracts Should Be Prohibited Only Where They Deprive an Alternative Distributor of a Vital Product</u>

Exclusive dealing arrangements, as the legislative history of the Cable Act attests,[42] produce significant benefits that

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[42] "The Committee believes that exclusivity can be a legitimate business strategy where there is effective competition." Senate Report at 28. "Exclusivity has long been recognized as a legitimate means of not only guarding intellectual property, but as a way of encouraging program diversity as well." 138 Cong. Rec. H6537 (daily ed. Jul. 23, 1992) (statement of Cong. Schaefer). "If exclusive contracts were prohibited, a cable network like TNT would have never gotten off the ground. In order to gain commitments from cable

translate to improved consumer welfare. The Cable Act recognizes these benefits in setting forth the "public interest" factors to be considered by the Commission in making determinations as to whether exclusive contracts are valid.

A principal benefit of exclusivity, recognized by the Supreme Court in Continental TV v. GTE Sylvania,[43] is inducement for the distributor (the MSO) to promote fully the programming to which it has exclusive rights, chiefly by preventing its potential distribution rivals from "free-riding" (i.e., receiving the benefits without incurring the costs) on its promotional efforts.

The Besen Paper (at pages 37 and 38) points out that "free riding":

> reduces the return a distributor earns from its efforts and thus reduces its incentives to undertake them. As a result, individual distributors will fail to make some efforts whose total value exceeds their costs...To the extent that free riding is a problem when more than one distributor carries a program service, the net revenue that might otherwise be realized by adding a second or third distributor is reduced. As a result, in some cases, the service will prefer exclusive distribution.

Full promotion by the distributor results in greater penetration, which increases the programmer's profits. This, in turn, promotes greater investment in program production. These

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operators to carry and pay for TNT, Turner had to offer exclusive distribution rights." 138 Cong. Rec. H6536-37 (daily ed. Jul. 23, 1992) (statement of Cong. Fields).

[43] 433 U.S. 36 (1977), on remand, 461 F. Supp. 1046 (N.D. Cal. 1978), aff'd, 694 F.2d 1132 (9th Cir. 1982).

factors were incorporated into Section 628(c)(4)(C) of the Act, which requires the Commission to consider "the effect of such exclusive contracts on the attraction of capital investment in the production and distribution of new satellite cable programming."

This benefit was among those recognized by the Commission in its recent proceeding to reinstate the broadcast syndicated exclusivity rules. The Commission found that the lack of syndicated exclusivity rules reduced programming supply:

> Program suppliers, like other business people, respond to incentives. The greater the total number of programs and the quality and diversity of programs that are produced, the greater are the financial incentives facing program suppliers; and these incentives are greater with syndicated exclusivity rules than they are without them.[44]

The Commission pointed to the abundance of modern economic theory and judicial precedent to show that vertical arrangements, such as program exclusivity, are a means of enhancing consumer welfare.[45] The Commission concluded that "exclusivity is a normal competitive tool, useful and appropriate for all sectors of the industry, including cable as well as broadcasting."[46]

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[44] Syndicated Programming Exclusivity, 3 FCC Rcd 5299, 5309 (1988) ("Syndex").

[45] Id. at 5337 n. 141 (1988) (citing The Antitrust Paradox, 299-309; Impact Evaluations of Federal Trade Commission Vertical Restraints Cases, Federal Trade Commission Report, (1984); Continental TV v. GTE Sylvania, supra; Business Electronics Corp. v. Sharp Electronics Corp., 56 U.S.L.W. 4387, 4393 (May 2, 1988)).

[46] Syndex, 3 FCC Rcd. at 5310 (emphasis added).

The Syndex report set forth an additional rationale in support of exclusivity: it encourages the creation and distribution of alternative programming by the distributor denied access to a particular source of supply, thereby increasing diversity. The Commission explained:

> It is . . . likely . . . that the reimposition of syndicated exclusivity would lead to the development of new programs to take the place of those for which broadcasters enforce exclusivity. The central -- and critical -- point here is that these programming choices would be made in response to viewers' preferences in a television marketplace with as full and fair competition as possible. The reinstituting of syndicated exclusivity, as a part of our exclusivity rules, is an important element in such a pro-competitive policy.[47]

This rationale was also included in the 1992 Cable Act in Section 628(c)(4)(D) which requires the Commission to consider "the effect of such exclusive contracts on diversity of programming in the multichannel video programming distribution market."

For all of these reasons, exclusive arrangements have been viewed in numerous contexts, as beneficial. NTIA has stated that "refusals to deal by programmers, or exclusive dealing arrangements generally appear to be legitimate arrangements, conferring benefits on the parties involved."[48] In a case very

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[47] Syndex at 5311. Confirming the Commission's predictions, new programming services apparently available only to MMDS and HSD are now appearing in the marketplace. See Wireless: Going Head to Headend with Conventional Cable, Broadcasting, Sept. 18, 1989, at 62.

[48] NTIA, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations 105-106 (1988).

instructive on the issues in these proceedings, the Ninth Circuit recently upheld exclusive arrangements for television programming in the face of an antitrust challenge brought by a competing television station claiming denial of access. The Chronicle Broadcasting court reasoned that alternative programming was available to the complaining station and the pro-competitive benefits of exclusivity outweighed any harm to the individual station.[49] The concurring judge in Chronicle Broadcasting cautioned that "the absence of exclusivity might result in a popular program being shown by several stations simultaneously, which would reduce consumer choice pro tanto."[50]

These judgments were later confirmed in Tarzana v. Pacific Theaters, Inc., which upheld the practice of exclusive motion picture clearances as pro-competitive.[51] Finding no lack of competition for the production and supply of movies, the court concluded that the use of exclusive dealing contracts would enhance diversity by increasing the variety of films that would be available in a particular area.

As a result of the consumer benefits that flow from exclusivity, the Commission should conclude that only where an exclusive contract deprives a distributor of a "vital" program

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[49] Ralph C. Wilson Indus., Inc. v. Chronicle Broadcasting Co., 794 F.2d 1359 (9th Cir. 1986).

[50] Id. at 1359, 1367. See also Syndex at 5337 n. 154, citing Chronicle Broadcasting.

[51] Tarzana v. Pacific Theaters, Inc., 828 F.2d 1395, 1397 (9th Cir. 1987).

service necessary to its competitive survival should such contract be deemed an "unfair" method of competition under Section 628. Further, if there are multiple program services available, then, absent truly unique circumstances, a particular program service cannot be deemed vital to the distributor. This formulation is analogous to the "essential facilities" doctrine and a line of cases creating an exception to that doctrine. Under the "essential facilities" doctrine there is, in certain limited circumstances, a duty to deal, but only if the product or facility at issue is necessary to the competitor's survival.[52] In addition, subsequent cases have held that the doctrine does not apply where alternative services are available.[53]

The right to exclusivity is particularly important for new program services. The Commission correctly notes that "exclusive rights may well be essential to the introduction of new services and, thus, should be permitted to the extent necessary to ensure continued program diversity." (Notice at para. 36). This rationale was expressly adopted by the Supreme Court in Continental TV v. GTE Sylvania, where the Court stated in the context of exclusive dealing restrictions in manufacturing that

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[52] See e.g., MCI Communs. Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983).

[53] See e.g., Flip Side Productions, Inc. v. Jam Productions, Ltd., 843 F.2d 1024, 1034 (7th Cir.), cert. denied 109 S. Ct. 261 (1988) (access to more desirable public arena not required); Twin Laboratories, Inc. v. Weider Health & Fitness, 1989-2 Trade Cases (CCH) para. 68,678 (S.D.N.Y. 1989) (access to more desirable publication not required); Driscoll v. City of New York, 650 F. Supp. 1522, 1530 (S.D.N.Y. 1987) (access to more desirable tour boat pier not required).

"new manufacturers and manufacturers entering new markets can use the restrictions to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer."[54]

The Besen Paper (at page 12) similarly concludes that start-up programmers have numerous reasons for seeking exclusivity, including "sharing with distributors the risks of sinking investments in program rights or production, avoiding being placed in the difficult position of bargaining with distributors after program investments already are sunk, and being able to adapt the programming to the demands of distributors."

Similarly, the Department of Justice, in its 1985 Vertical Restraints Guidelines (Sec. 4.225) stated that:

> If recent entrants employ the restraint, the most likely purpose is to persuade dealers to carry and promote a product -- a procompetitive purpose. While a vertical practice may be used for both efficiency and anticompetitive purposes, its voluntary use by new entrants or firms with small market shares makes it more credible that its use by other firms in the market is designed to achieve potential efficiency gains. Thus, there is substantial support for per se legality for exclusive contracts involving new program services.

For the reasons cited above, the Commission should adopt a narrow reading of the exclusivity provisions in Section 628(c) of the Act. As explained in the Besen Paper (at page 40-41), exclusivity produces significant benefits for programmers,

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[54] 433 U.S. 36, 55 (1977).

distributors and consumers, and carries with it very little potential for anticompetitive effect:

> There are a variety of reasons why program services may prefer exclusive distribution. As already pointed out, none of the reasons discussed here rely on a distributor being able to exercise increased market power because the exclusive rights it receives disadvantage some rival distributor serving the same geographic market. In addition, each of these reasons why the program service would prefer exclusivity also is a reason that exclusivity would contribute to greater efficiency.

### B. Determining What Constitutes Conduct that "Hinders Significantly" or "Prevents" a Distributor From Providing Service to Consumers

As noted, in order to prove a violation of Section 628, a particular distributor must show that a vertically integrated programmer's conduct "hinders significantly" or "prevents" the distributor from providing programming to consumers.

Certainly, this standard cannot be satisfied simply by showing that the distributor is unable to deliver the defendant's program service. Rather, the distributor must show that it is unable to deliver alternative programming which would enable it to achieve similar revenues. If alternative programming is available, the distributor cannot reasonably claim that it is unable to serve consumers. Only when the distributor's competitive viability is threatened, does it have a legitimate claim under Section 628.

This analysis is supported by the legislative history, in which Section 628 is repeatedly characterized as a prohibition on barriers to entry. Congress recognized that removing impediments to new entry in program distribution would be the most effective means of promoting consumer welfare.

> I do not oppose taking steps to increase competition and lower the barriers to entry to cable's competitors. Indeed, I support the provisions of S. 12 that seek to do this, such as the programming access provisions. Lowering barriers to entry is the key to allowing real competition to develop in this industry.

10 Cong. Rec. S755 (daily ed. Jan. 31, 1992) (statement of Sen. Leiberman).[55]

In enacting Section 628, Congress was concerned with prohibiting unfair methods of competition that might thwart competition in the video programming distribution market. Differences in price, terms, and conditions that merely disfavor a specific distributor without "significantly hindering" competition in the market should not be of concern to the Commission.

Moreover, as the Commission notes, conduct might be considered "unfair" from the standpoint of a particular competitor, "yet does not significantly harm competition in multichannel video programming distribution."[56] This is, of

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[55] See also 10 Cong. Rec. S737 (daily ed. Jan. 31, 1992) (statement of Sen. Gore); 105 Cong. Rec. H6535 (daily ed. July 23, 1992) (statement of Cong. Tauzin).

[56] Notice at para. 10.

course, a fundamental precept of competitive marketplace analysis. Like the antitrust laws, the Cable Act was designed to protect competition, not competitors. This is clear from the use of the phrase "unfair methods of competition," and "deceptive acts or practices," standards which were borrowed directly from Section 5 of the Federal Trade Commission Act.[57] In recent years, Section 5 has been interpreted to prohibit only conduct having substantial anticompetitive effects in a relevant market,[58] not conduct that merely injures a specific competitor.

In the Notice, the Commission inquires whether it should exclude from Section 628 programmers that could not have the significant anticompetitive effect on the marketplace required by subsection (b). TCI supports such an approach. The legislative history makes clear that Section 628 was designed to reach major program services.[59] Therefore, services that, because of their size, could not "hinder significantly" or "prevent" a distributor from serving consumers are outside the scope of Section 628. There are a number of ways the Commission could measure size in this context. A simple method would be to exempt program services that have less than a specified number of total

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[57] See 15 U.S.C. Sec. 45.

[58] General Motors Corp., 103 F.T.C. 641, 701 (1984) ("in cases such as this where there has been no demonstration of anticompetitive impact" there is no violation of Section 5); Boise Cascade Corp. v. FTC, 637 F.2d 573, 579 (9th Cir. 1980) (In Section 5 case, no violation where "a complete absence of meaningful evidence in the record that price levels ... reflect an anticompetitive effect.).

[59] Senate Report at 14, 24.

subscribers, or less than a specified percentage of the total subscribers. The Commission could also look to advertising revenues or viewership levels. TCI supports any rational approach that would increase marketplace certainty with regard to Section 628.

## V. The "Undue Influence" Standard of Section 628(c)(2)(A) and the "Conditioning" and "Coercion" Standards of Section 616(a)(1) and (2) Require a Showing of Explicit Threats or Intimidation in Order to Render Conduct Illegal

In the Notice (paras. 55 and 56) the Commission seeks comment on what evidence should be necessary to show that a cable operator: 1) "conditioned" carriage of a program on a requirement that the program service grant a financial interest in the service; and 2) "coerced" a program vendor into granting an exclusive contract. In addition, the Commission requests comment on what constitutes "undue influence" by an affiliated cable operator under Section 628.

The standards in these sections are closely analogous to those established in antitrust cases dealing with tying arrangements and exclusive dealing contracts. An illegal tie requires a showing that the sale of one product was "conditioned" on the purchase of another. The Supreme Court has recently reiterated the long-established rule that an illegal tie must involve more than the mere purchase of two products -- there must be independent evidence of "forcing" or "coercion." Jefferson Parish Hospital v. Hyde, 466 U.S. 2 (1984). Earlier courts similarly held that the mere fact of a tying contract is insufficient to establish illegality. Capital Temporaries v. Olsten Corp., 506 F.2d 658, 666 (2d Cir. 1974). Drawing on these cases, it seems abundantly clear that the mere fact that a carriage agreement is executed simultaneously with a financial interest agreement or, indeed, that the two are in the same contract, does not establish a violation of Section 628 or Section 616. The Commission correctly notes that the 1992 Cable Act does not make either a financial interest or an exclusive contract per se illegal.

As to what constitutes proof of "conditioning" or "coercion," the courts in numerous antitrust tying cases have required explicit proof of threats or intimidation. A finding of coercion thus requires more than aggressive sales techniques or idle threats. See Bob Maxfield, Inc. v. American Motors Corp, 637 F.2d 1033, 1037-38 (5th Cir. 1981) (strong persuasion, encouragement, or cajolery to the point of obnoxiousness without evidence of an implied requirement backed by sanctions is not coercion); Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1328-29 (5th Cir. 1976) (voluntary purchase of product without proof decision resulted from anything other than persuasive selling techniques is not coercion); Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1225 (3rd Cir. 1976) (fact that large number of buyers bought tied products is not enough proof); Umphres v. Shell Oil Co., 512 F.2d 420, 423 (5th Cir. 1975) (pressuring franchisees to participate in company programs when franchisees retain ultimate choice is not coercion); Capital Temporaries, Inc., at 666 (obligating purchaser to accept numerous commodities by contract without proof of force or when alternative source exists is not coercion); Webb v. Primo's Inc., 706 F. Supp. 863, 867-68 (N.D. Ga. 1988) (unproven threats and other coercive behavior without proof that product was withheld or that purchase was foreclosed from shopping around in not coercion); McAlpine V. AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232, 1246-1247 (E.D. Mich. 1978) (scattered threats and aggressive sales technique (including profanity and alleged telephone harassment) without proof such act influenced the buyer's choice insufficient to show coercion even when tied product was purchased).

Similarly, in exclusive dealing cases the courts have sometimes held that a complainant must show coercion and that this claim must fail if the contract "was entered into voluntarily to gain the benefits inherent in [the contract] and [the complainant] was free to refuse the offer." Rayco Mfg. Co. v. Dunn, 234 F. Supp. 593,599 (N.D. Ill. 1964). See also American Oil Co. v. McMullin, 508 F.2d 1345, 1352 (10th Cir. 1975) (no evidence of coercive exclusive dealing if there is no evidence that plaintiff desired to deal with others).

The holdings of these cases, requiring explicit threats or intimidation, should be applied to the "undue influence,"[60] "conditioning," and "coercive" standards under the Cable Act. Distributors and suppliers must be allowed to engage in tough, aggressive negotiations. Such hard bargaining ultimately produces an efficient supplier-distributor relationship to the great benefit of consumers. That is the reason courts and scholars have so widely agreed on the above analysis. If the Commission adopts rules which have the effect of replacing aggressive bargaining with cautious accommodation, it will have, at least for the cable industry, destroyed a fundamental precept of American business. Congress did not intend so radical a transformation, and the Commission should not impose it. Rather, the Commission should conclude that the "undue influence" standard of Section 628(c)(2)(A) and the "coercion" standards of Section 616(a)(1) and (2) require an explicit showing of threats and intimidation.

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[60] In addition, the "undue influence" under Section 628 must result in substantial harm to competition, as we have previously set forth in Section II of these comments. It is also questionable under principles of business organization law whether a controlling, or even major, shareholder can ever exert "undue" influence over the business practices of the entity in which it has a major financial interest. Again in accord with our prior analysis, it would seem that only influence that substantially lessened competition would be "undue."

## VI. The Commission Should Adopt Complaint Procedures That Allow For Full and Fair Development and Adjudication of the Complex Factual and Legal Issues Likely to Arise Under Rules Regulating Program Contracts

The Notice proposes that Section 628 complaints be handled through the abbreviated procedures the Commission recently adopted for "lowest unit charge" complaints under the Commission's political broadcasting rules.[61]

TCI opposes the Commission's proposal to employ informal, summary procedures to adjudicate program access complaints because such procedures: 1) are not conducive to full development and fair adjudication of the complex issues involved in program access disputes; and (2) will not result in an adequate record for meaningful decisionmaking by the Commission and appellate review in the Courts. As pointed out in the Besen Paper (at page 4), "[g]iven the efficiencies that vertical arrangements can produce, detailed analysis is necessary before one can safely conclude that they lead to the increased exercise of market power and that this more than balances the effects of the additional efficiencies." (emphasis added).

Therefore, TCI urges the Commission to adopt adjudicatory procedures similar to those employed for formal complaints

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[61] Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act, as amended, 6 FCC Rcd. 7511, 7513 (1991), recon. denied, 57 Fed. Reg. 27,367 (June 19, 1992). See Notice at para. 39 and nn. 57 and 58.

against common carriers, under which any complaint and answer framing a material dispute of fact would be referred to an Administrative Law Judge for supervision of full discovery, conduct of an evidentiary hearing on the record, and issuance of an initial decision (findings of fact and conclusions of law) which would then be subject to review by the Commission.

## A. The Abbreviated, Summary Procedures Adopted for Lowest Unit Charge Complaints Are Not Appropriate for Program Access Complaints

The procedures for lowest unit charge complaints are inappropriate for program access complaints because of fundamental differences in the kind and complexity of issues presented in the two kinds of complaints.

Lowest unit charge complaints require evidence of conduct by only one party -- the accused broadcaster -- to resolve only one issue -- what prices were charged by that broadcaster in a particular time period. From a finite and relatively standardized set of data, the Commission staff are required only to determine whether or not different prices were charged for different transactions. There is no inquiry into the purpose or effect of any price differential, no need to study or compare innovative (or even unusual) pricing mechanisms, no need to define markets or measure any party's power therein, no need to identify or quantify entry barriers, and no judgment to be made as to the short- and long-term effects on the marketplace of the challenged acts or practices.

The relative simplicity of lowest unit charge cases contrasts sharply with the inevitable complexities and subtleties that must be addressed in program access cases. Such cases will necessarily require the Commission to adjudicate -- on a case-by-case basis -- commercial controversies substantively identical to those traditionally heard by federal courts under the antitrust laws and by the Federal Trade Commission under the antitrust and consumer protection statutes. The application of regulatory laws and rules to such controversies is unavoidably complex, requiring detailed inquiry into the nature and effect of business transactions and evaluation of often-conflicting expert analyses of those transactions and their effects by economists and others.

## B. Conventional Pleading Practices and Trial Type Hearings Before and Administrative Law Judge Will be Required in Most Program Access Disputes

Under Section 628, the Commission will be called upon to adjudicate the "fairness" and competitive impact of a wide range of acts and practices in the dynamically evolving program distribution marketplace. The parties are likely to come forward with executives, industry experts, and economists offering sharply contrasting analyses and conclusions about the nature and effects of the conduct in issue. The very existence of the challenged conduct may well be in dispute. Consequently, program access disputes are likely to be just as important to commerce -- and just as complex -- as those arising under the Sherman and Clayton Acts.

TCI appreciates the Commission's desire to minimize the burdens imposed on the Commission by Section 628. However, treating program access complaints as if they were no more complex than lowest unit charge complaints would deny all parties to such disputes a fair hearing. It would be arbitrary and capricious to accord the parties to a program access dispute lesser procedural rights than those afforded to parties to the traditional trade regulation disputes in the Courts and before the FTC.

1. Pleading requirements. The pleading requirements proposed in the Notice (at para. 40) assume that program access issues in a complaint will be easily distilled into factual allegations that can be readily admitted or controverted. However, under Section 628, the existence or nonexistence of a challenged act or practice is only the tip of the iceberg: the real issue in any such case is likely not to be whether something happened or did not happen but what difference it makes to actual and potential competition in a properly defined market.

2. "Prima facie case". While the Commission uses the term "*prima facie* case" in the Notice (at para. 40-42), it does not use that term in the context in which it customarily arises in

civil litigation and analogous proceedings under the Commission's own rules involving formal complaints against common carriers (47 C.F.R. Secs. 1.720 _et seq_.). Under traditional civil practice, the _prima facie_ case refers to testing the sufficiency of the complaint on the assumption that its allegations are true. _See_, _e.g._, 47 C.F.R. Sec. 1.728; Rule 12(b)(6) of the Federal Rules of Civil Procedure. However, the Notice seems to envision a procedure in which the complaint and answer are dispensed with altogether and replaced by what will be, in effect, commencement of the case by cross motions for summary judgment. Such a process is patently unfair to the defendant in a program access case.

Any competent lawyer will be able to plead a general description of the challenged conduct and to recite the requisite marketplace harm, and a complainant will have the luxury to take whatever time is necessary to marshal affidavits of business people and economists that will parrot the general allegations of the complaint. However, it is unrealistic and unfair to suppose that the defendant in such a case could marshal and present not only a denial but affidavits and evidence as to all material allegations of the complaint without discovery and in only twenty days. As a point of comparison, the Commission's rules governing formal complaints against common carriers allow thirty days for an answer that does no more than admit or deny the allegations of the complaint. 47 C.F.R. Secs. 1.720-28.

3. Discovery. A crucial distinction between the lowest unit charge proceedings and the likely characteristics of program access cases is the need for discovery. In a program access case, the defendant is unlikely to be able to respond to allegations about the effects of its acts or practices without full inquiry into the effects of those practices on the complainant. Neither party is likely to be able to address the issue of marketplace effect without discovery of third parties. The conventional means of discovery -- interrogatories, document requests, and depositions -- are all likely to be needed to develop the information necessary for the parties to present such a case and for the Commission to decide it.

4. Protective Orders. The Commission acknowledges the importance of protecting proprietary information. However, the measures it proposes to protect such information -- disciplining lawyers and dismissing complaints -- are inadequate. Certainly, such discipline as the Commission has jurisdiction to impose should be imposed upon lawyers who violate a protective order. However, such discipline may not deter violations by the parties themselves (especially parties who are not Commission licensees) and will have little effect on lawyers who are not regular practitioners before the Commission. To alleviate this problem, the Commission should require by rule that the taking of any discovery by any party in a program access proceeding is explicitly conditioned upon that party's submitting in advance, by a writing filed with the Commission, to the jurisdiction of

the Commission and the United States District Court for the District of Columbia for the enforcement -- by injunction and monetary sanction -- of any protective order entered by the Commission in the proceeding.

### C. Forfeitures Should Not Be Imposed for a Violation of Section 628 Unless the Violation is Willful and Repeated

The Notice also requests comment on applicable penalties for violation of rules promulgated under Section 628.[62]. Subsection 628(e) confers upon the Commission the authority to order appropriate remedies after an adjudicatory proceeding, including the ability to impose forfeitures under Title V of the Communications Act. TCI believes the Commission should not impose fines for Section 628 violations unless the conduct complained of is willful and repeated. This principle is consistent with other penalty provisions in the Communications Act,[63] and also accounts for the ambiguities inherent in this area of the law; i.e., that the same conduct can appear anti-competitive while actually achieving beneficial consumer gains.

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[62] Notice at para. 49.

[63] See e.g., 47 U.S.C. Secs. 312(a)(7), 503(b).

## VII. Conclusion

For the foregoing reasons, TCI respectfully recommends that the Commission adopt rules to implement Sections 628 and 616 of the Act consistent with the comments contained herein.

Respectfully submitted,

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OFFICE OF THE SECRETARY

# EXCLUSIVITY AND DIFFERENTIAL PRICING FOR CABLE PROGRAM SERVICES

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